(25)

No. 90-1014

In the Supreme Court of the United States

October Term, 1991

ROBERT E. LEE, ET AL.,
PETITIONERS,

v.

DANIEL WEISMAN, ETC.
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF UTAH IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The ACLU Foundation of Utah, Inc. (ACLU-U) is currently sponsoring litigation concerning the validity of prayers at graduation exercises in two school districts in Utah. That litigation has been stayed pending the outcome of *Lee v. Weisman*. Thus, the amicus has a direct stake in the outcome of this proceeding.

The Utah litigation was filed in 1990. The complaint alleges that two of the school districts in Utah have an ongoing practice of permtting religious prayer, usually an opening invocation and a closing benediction, given by students as part of the official graduation exercises of the

high schools in those districts. Attached as an Appendix to this brief are transcripts of prayers said at some of the graduation exercises in 1990.

In both districts, graduation exercises are held in the schools themselves or in rented facilities when demand requires. School officials and staff are involved in planning the program and participate in the program, although most schools also have some degree of student participation in the planning and presentation of the program. Teachers and counselors have been required to attend in the past. Although their attendance was made voluntary for the spring of 1991, teacher and counselor plaintiffs in the current litigation assert that they want to attend the ceremonies to be part of recognizing their students' achievements. Although diplomas are only nominally distributed at these ceremonies, the ceremonies are the principal official recognition of students' graduation.

Granite School District decided that the schools in the Granite District attended by the named plaintiffs would not include prayers in this spring's graduation exercises, and the plaintiffs agreed not to pursue preliminary injunctive relief against Granite for spring 1991.

Alpine District has stated that it has an unbroken tradition dating from 1912 of having invocation and benediction prayers at graduation exercising. In a survey of students taken in the spring of 1991 at Alpine High, 345 (89%) stated that they wanted prayers at graduation while the other 41 (11%) expressed a preference against prayers in the ceremony.

On May 15, 1991, the District Court entered an order denying plaintiffs' motion for preliminary injunction regarding graduation exercises at Alpine for this spring, but imposing conditions on the context in which prayers

could be offered. The District Court stated: "In this court's opinion, there is a reasonable likelihood that the Supreme Court will follow its own precedent in *Marsh v. Chamebrs*, and regard invocation and benedictions at high school graduation ceremonies to constitute an exception analogous to opening ceremonies at legislative sessions." The District Court also concluded that the policies of Alpine were not invalid under *Lemon v. Kurtzman* because the primary effect of prayers would be to solemnize the occasion rather than to promote religion and because "excessive entanglement of government with religion is avoided because of clear guidelines as to acceptable content, no preliminary review by school officials of the prayers, and no monitoring." The District Court stated, however, that prayers at graduation "must be nonsectarian, nondenominational, and nonproselytizing."

The District Court also issued an order staying further proceedings in the Utah case pending this Court's ruling in this case.

SUMMARY OF ARGUMENT

Several lower courts have analyzed high school graduation prayers in terms of *Lemon v. Kurtzman* and *Marsh v. Chambers*, asking which of those cases controls. There is no need to ask this question nor to revisit the vitality of *Lemon* because the antecedent school prayer cases, as well as sound constitutional principle, should suffice to keep prayers out of the public schools and the official ceremonies that are part of those schools' processes.

Nevertheless, if this Court chooses to revisit *Lemon*, there is good reason to reject it as a test for deciding specific cases while retaining some of its principles as a guide to decision in crafting general rules. In this particular instance, the key elements of *Lemon* are the effects and en-

tanglement prongs. Those prongs could be said to create a "Catch-22" situation in which a school official is condemned for failing to monitor the religious content of a particular practice and condemned for monitoring it to the point of entanglement. This phenomenon will be referred to throughout as the effects-entanglement "conundrum."

The conundrum is actually a sensible way of expressing the point that there are some forms of aid or accommodation to religion that cannot be sustained under the establishment clause. Any practice that advances religion in the public schools, and which is not necessary under the free exercise clause, runs the risk of encountering this phenomenon. To prevent the practice from endorsing a particular religion, school officials would need to monitor and sanitize prayers to at least some extent. But monitoring and sanitizing would create a government-sponsored form of religion that itself offends the establishment clause. Therefore, a practice that tends to advance religion is not permissible in the public schools.

Some examples from Utah show how the conundrum works and argue strongly for adopting a rule banning graduation prayer without considering the precise context in which the prayer is offered. In the first place, some prayers recited at recent Utah graduation ceremonies are presented to show how a particular denomination's tenets and practices are part of the format of prayer. To avoid giving the appearance of endorsing this particular denomination, school officials would have to sanitize prayers out of this or any other identifiable format. Doing so would create a governmentally sanctioned form of prayer, a practice held invalid in *Engel v. Vitale* for good reason.

Secondly, adopting a rule that would make the validity of prayer dependent on the context of the particular

school and its connection to a particular religion would be extraordinarily divisive in the Utah context. It would be particularly distasteful and divisive to litigate the extent to which a particular school, its educational program and social life, were dominated by a particular religion. This type of litigation should be avoided by adoption of a clear rule that graduation prayer offends the establishment clause regardless of the degree of influence of any particular denomination within a given school.

I. APPLICATION OF *SCHOOL DISTRICT V. SCHEMPP* WOULD AVOID ANY NEED TO REVISIT THE HOLDING OF *LEMON V. KURTZMAN*

It is not entirely clear why many of the lower courts dealing with graduation prayers have analyzed these cases under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Simple application of *Engel v. Vitale*, 370 U.S. 421 (1962) and *School District v. Schempp*, 374 U.S. 203 (1963) should be sufficient without moving to the later decision in *Lemon*. ACLU-U suggests that the Court should apply *Schempp* and not concern itself with the continued vitality of *Lemon* or its three tests. Particularly compelling is the following language from *Schempp:*

> While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs.

This simple assertion answers all of the contentions made by the defendants in the Utah litigation. A graduation exercise is state action. Prayers that are part of that ceremony are a religious practice making use of state machinery . There is nothing to prevent any student or other

participant in that ceremony from praying in a way that does not impose on other participants; indeed, there would seem to be a clear right of any participant to engage in silent prayer or even open prayer that neither disrupts nor becomes part of the official ceremony. The Utah defendants have claimed that prayer is protected by the free exercise rights of the majority, but as *Schempp* says, those rights do not include the right to use state machinery in pursuit of their religion. And as *Schempp* and *Engel* point out, use of the state machinery, at least in the public school context, for religious practices is inherently coercive.

Defendant school districts in the graduation prayer cases have relied heavily on *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislative prayer), and have asserted that it constitutes an exception for ceremonial occasions from the *Lemon* line of cases. But *Marsh* should not be read as constituting an exception to *Schempp;* there are abundant distinctions between the setting of high school graduations and legislative sessions. Nevertheless, we recognize that many courts have turned to *Lemon* in analyzing the graduation prayer issue, and we will provide the Court with our observations of the vitality and applicability of the *Lemon* tests.

II. IF *LEMON* WERE REJECTED, THE AVAILABLE TESTS WOULD STILL PRECLUDE PRAYERS AT PUBLIC SCHOOL GRADUATION EXERCISES.

There are several related reasons why the lower courts may have approached the problem of graduation prayer from the perspective of *Lemon*. One is that *Lemon* has been mentioned by some Justices of this Court in some school contexts, such as the moment-of-silence and

Creation-Science cases, thus making it seem applicable to this controversy. In addition, *Marsh v. Chambers* was decided later as an apparent exception to the holding of *Lemon*, and is the precedent on which most supporters of graduation prayer rely. The combination of these circumstances, coupled with the questioning of *Lemon* in a number of opinions in this Court, makes *Lemon* seem important to several courts dealing with this issue despite the surface applicability and unquestioned vitality of *Engel* and *Schempp*. Therefore, ACLU-U will discuss the vitality of *Lemon* and what options might exist for the Court.

Many commentators, and some members of this Court, have noted problems with the Court's reliance on the three-pronged *Lemon* test. Some of those problems have been disclosed in the handling of graduation prayer cases in other courts. We believe that there are two interrelated problems that might justify dispensing with the *Lemon* prongs as tests for individual cases but that those prongs are indicative of how the Court should construct rules for generic groups of cases, such as the graduation prayer group.

A. The Problems With *Lemon Stem* From Its Use in Specific Cases, Not From Its Choice of Factors

Lemon was decided in the context of, and for the purpose of analyzing, public aid to religious enterprises, particularly public assistance to religious schools. By contrast, we are dealing here with questions of religious practices in the public schools. It would seem that *Lemon's* concerns over effect and entanglement are relevant to the latter problem only when the public school attempts to accommodate religion and then to control the nature of the religious practice. Graduation prayer is neither a

necessary nor a wise accommodation of religion, and the *Lemon* problems should be a guide to showing that it amounts to a classic establishment problem.

1. *Lemon's purpose prong neglects the mixed purposes that often exist for a single decision.*

The purpose prong of *Lemon* seems to assume that there is a single purpose for every human decision or course of action. That assumption has not held true for many issues of public support for religious institutions. For example, in thinking about public financial support for religious schools, such as tax breaks or provision of books and supplies, the state has been found to be motivated by a conscious desire to support a religious institution for a secular purpose. The state may well want to support religious schools to take some of the brunt off the public school system. Assume, for example, that it costs $4000 to educate a student in the public school system. If a religious entity were able and willing to provide a comparable level of education with $2000 of support from the public treasury, then the state could save $2000 per child by paying $2000 directly to the religious school. This shows that the state could well have mixed motives for supporting the religious schools. *Mueller v. Allen*, 463 U.S. 388 (1983); *see also Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

Conversely, turning from support for religious schools to involvement of religious issues in the public schools, motivation is not helpful in assessing the impact of a particular practice. For example, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the motivations of the legislators who voted for the statute were not important to the question of what the children in those schools would believe to

be the message they were being given by the State. What is important is the impact on the audience. If the statement made at the beginning of the day did not include the message that the moment of silence were being provided for "meditation *or voluntary prayer*," then a moment of silence might well have been acceptable regardless of what religious motives could have been found in the legislative history.

As another example, Justice Scalia took the majority in *Edwards v. Aguilard*, 482 U.S. 578 (1987), to task for focusing on the motives of the legislators who promoted the "Creation-Science" statute. But the majority in *Edwards* also relied heavily on the practical effect of the statute in promoting or "endors[ing] a particular religious doctrine." As with most legislative acts, the motives of the legislators were probably mixed and certainly would be irrelevant to the degree of impact that the statute would have in the public schools. The critical issue in the public school setting is the day-to-day experience of the student. Under the directives of the Creation-Science statute, especially in light of its attendant curriculum guides and oversight board, students might well have received the message that the religious explanation of creation was entitled to as much or more credence than the "scientific" explanations. This result would have occurred because the scientific hypothesis of instant appearance of a universe virtually unchanged from its present state would not likely be presented independently of the corollary religious implications. The effect then would be to persuade each student that the state had taken an official position endorsing the religious explanation of creation. The only way for the state to remain neutral as between religious and "scientific" explanations would be not to require official mention of the religious explanation.

The Creation-Science dispute presents the prospect of some interesting converse problems. What if the statute had prohibited the teaching of scientific theories that tended to disprove the theory of evolution? This statute would almost certainly have impeded the academic freedom of the teachers. What if the statute prohibited the teaching of competing religious theories? Probably the result would also be against the statute for the same reasons. although this is a closer question. The full import of *Edwards* must be to avoid imposition on teachers of how they present material in the classroom, at least so long as the teacher does not use the podium for promulgation of his or her own religious beliefs. This realization reinforces the view that the motives of the legislators are not helpful in assessing the impact of a practice that has some tendency toward establishment of religion in the public schools. The essential question instead is the degree of that tendency.

2. *Lemon's effect-entanglement "conundrum" shows that some types of support for religion inevitably produce official dictation of religious content.*

In many of the cases involving public aid to religious schools, the Court has found either (1) that there is an effect of aid to religion because the public officials have not monitored use of the aid to prevent that effect or (2) that there is an excessive entanglement of state and religion because public officials would be monitoring the use of aid to prevent its being used for support of religious activities. The monitoring required to prevent a primary effect of aid to religion is sometimes found to entangle the school and public officials to an excessive degree and thus to violate the establishment clause. This analysis appears to create a "Catch-22" situation in which the public aid may be invalid if it is allowed to be used for religious purposes but also invalid if officials monitor its use to guard against religious use. *Aguilar v. Felton*, 473 U.S. 402, 420 (1985) (Rehnquist, J., dissenting).

The conundrum is not as implausible as it might seem. What the Court is recognizing, however cumbersome the *Lemon* approach, is that there are certain kinds of aid that cannot be provided without requiring public officials to monitor how teachers in religious schools spend their time. Thus, the interplay of the effect and entanglement prongs is useful in constructing a rule for decision with regard to different kinds of aid. For example, these prongs illustrate how the state could provide textbooks for physical science classes without involving itself in how the science classes are taught. On the other hand, provision of teachers' salaries would require monitoring to ensure that the teachers are actually teaching science without religious overtones, thus involving the state in preferring one instructional approach over another and violating neutrality toward religion.

The conundrum arises with the inculcation of religious messages into the public schools when those schools attempt to soften the denominational impacts of particular messages. Utah presents an example from earlier litigaion. Many public high schools in Utah are associated with a Mormon Seminary school, which is a church-owned facility adjacent to the public school in which religion classes are offered during released time from the public school. A former rule of the Utah State Board of Education said that academic credit for the religion classes could be counted toward graduation requirements in the public schools so long as the content of the religion classes were historical or philosophical and "not mainly denominational." In *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981), the Tenth Circuit held that the public schools

could not monitor the content of the religion classes to determine whether they were predominantly sectarian for the purpose of deciding whether to give academic credit for those classes toward the satisfaction of high school diploma requirements. Monitoring to sanitize content of those classes would inhibit religion, or advance a certain form of religion, in a manner that would offend the establishment clause. So far as we know, no Utah school district has accepted credit following *Lanner* for instruction in the Seminarys.

Lanner's approach seems paradoxical at first blush. But if academic credit can be accepted by public schools for avowedly religious instruction when transferring credit from a religious school, then the outcome is simply a rule that recognizing academic credit from religious instruction does not advance religion. On the other hand, the Mormon Seminaries are not fully accredited schools and it may not be possible to accept credit from them in any event.

The conundrum becomes acute in the graduation prayer set of cases if courts were to rule, as the Sixth Circuit seems to have done, that prayers are permissible when they are monitored by school authorities to sanitize from them references to deities or other theological attributes. *See Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). This judicial requirement should offend the entanglement prong of *Lemon* because it results in governmental fostering of a particular type of religion. The conundrum is most acute when the Sixth Circuit speaks of permitting prayers in the format of an "American civil religion." *Id.* at 1409. Judicial or administrative creation and supervision of an American civil religion would be anathema to both the Establishment and Free Exercise Clauses.

The District Court in Utah may have created this same problem when it ordered that prayers "should be under a policy which ensures no direct or indirect coercion, no identification with a particular religion, and that such be non sectarian, non denominational and non proselytizing in character." The court added that there could be "no preliminary review by school officials of the prayers, and no monitoring." How these conflicting mandates are to be accomplished is a mystery, especially in light of the distinctly denominational prayers from prior graduations that served as a backdrop to the court's order. *See* p. 25 *infra*.

The conundrum created by the effects and entanglement prongs of *Lemon* could be avoided by using those prongs as guidelines to formulation of results in generic groupings of cases. If a particular form of aid to religion or accommodation to religion cannot be accorded without entangling oversight, which would itself either advance or inhibit religion, then that particular form of aid should not be permissible. *Lemon* itself need not be applied to the individual cases that arise under the heading of religion in the public schools, but its tenets do lead to formulation of a general rule that official sanctioning or observance of religious practices is highly suspect. In the context of graduation prayer, that analysis shows that prayer cannot be permitted without either advancing religion or else involving public officials in a monitoring of religious observances that would promote one form of religion over others.

B. Application of Either an Endorsement or Exclusion Test Should Preclude Graduation Prayers Without Reference to School-Specific Context

Allegheny County v. ACLU, 109 Sup. Ct. 3086

(1989) produced a debate among the Justices of this Court over what test should replace the *Lemon* test if it were abandoned. Two leading contenders were that a practice would be invalid (1) if the practice constituted endorsement of religion (O'Connor, J., concurring) or (2) if "nonadherents would be made to feel like 'outsiders'" (Kennedy, J., dissenting). If either of these tests were adopted, graduation prayer should fail.

The parties will no doubt address thoroughly the question of how each of these tests would apply to graduation prayers. The interest of ACLU-U in this question is in having the Court adopt a rule with regard to graduation prayer that does not depend on the precise context of the individual prayer. The opinions in both *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Allegheny County* seem to make the validity of a particular practice turn on the surrounding circumstances. As Part III of this brief will show, requiring proof and analysis of the degree to which a particular graduation ceremony is part of a pervasive pattern of religious endorsement within a given school would produce deeply divisive litigation. In the context of a state such as Utah, the pervasiveness of one religion may be thought to be important to the validity of a particular practice. But on further reflection, it can be seen that pervasiveness with official support is precisely what the establishment clause is designed to prevent. Therefore, any practice that could tend in the direction of support of that pervasiveness ought to be prohibited by the establishment clause without proof that it is part of a pervasive pattern that already exists.

C. Neither Neutrality Among Religions Nor Voluntariness Is Possible in the Graduation Context

Another contender for replacement of the *Lemon*

test is the so-called neutrality test by which government would be allowed to support a variety of religious practices so long as it were neutral toward all religions. In other words, the argument is that the establishment clause does not require neutrality between religion and nonreligion but only neutrality among religions.

Again, we assume that the parties will thoroughly address the application of this principle to graduation prayer. Suffice to say that graduation is a single event in any individual student's life so that it would be impossible for a single graduation ceremony to encompass prayers or equivalent observances from all religions.

On the other hand, graduation is the culmination of an extremely critical stage in the development of young adults. If those high school students were aware that their experience would culminate with a religious observance, then their entire school experience would be colored by this apparent endorsement of religion. They would also be made to feel distinctly "outsiders" in their own schools. Any messages of a religious nature that are received during the school experience thus obtain greater force and significance. It is for this reason that the persons most affected by graduation prayer are not the graduating seniors but the students in the earlier classes who are receiving the reinforced message that religion is an important part of their schooling.

Coercion or voluntariness is irrelevant to this case because the real harm is spread back through the school to the entire student experience. Moreover, coercion is irrelevant to establishment clause analysis in a more fundamental sense. We will provide only a brief example to bolster the arguments of the parties on this point. Suppose, what could actually be the case, that we were deal-

ing with a very small town in rural Utah in which all the population and high school graduates were adherents of the same religious denomination. School prayers in that setting would not be coercive, nobody would be offended, but the situation would be a quintessential establishment of religion. The point of the establishment clause is to prevent establishment from occurring with official backing. In the example of the small town, it is critical that the machinery of the state not be used to maintain the existing dominance of a single religion. If that dominance persists without official assistance, that is a cultural phenomenon outside the concerns of the Constitution, but official backing is the concern of the establishment clause.

III. A BRIGHT LINE RULE IS REQUIRED TO AVOID EITHER DICTATION OF RELIGIOUS PRACTICES OR HIGHLY DIVISIVE LITIGATION OVER THE RELIGIOUS CONTEXT OF A PARTICULAR SCHOOL PRACTICE.

ACLU of Utah is currently engaged in litigation concerning the validity of graduation prayers in school districts in the state of Utah. The complaint in that case includes allegations that prayers and other religious observances are a regular part of the life of those schools. Our interest in the *Lee* v. *Weismann* outcome includes the hope that the Court will reach a rule that does not require litigation of the pervasiveness of religious observances in a particular school. To show why that type of result would be particularly onerous, we will sketch the background of religious and public school ties in the state of Utah, relying solely on published works rather than on court records of the Utah litigation, which has not yet resulted in an evidentiary hearing. One of the principal sources for the historical sketch below is M. L. BENNION, MORMONISM

AND EDUCATION (1939), published by the Department of Education of the Mormon Church.

A. The Utah Public School System Is Closely Linked to the Mormon Educational System

To illustrate some of the modern close working relationships between the public schools of Utah and the Mormon Educational System, we will set out a very brief history regarding the public and private schools in the state. In many ways, that history parallels the history of several New England colonies two hundred years earlier, but there has been no cataclysmic event comparable to the American Revolution and Framing of the Constitution to amalgamate the cultural life of Utah with that of the rest of the States.

Utah was settled (following aboriginal occupation by several Indian tribes, exploration by the Spanish, and occasional use by trappers) by the congregation of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormons. Having suffered religious persecution and expulsion from Missouri and Illinois, the congregation left what was then the United States and moved *en masse* to the Great Basin area to establish "Zion." Zion was a consciously theocratic society which incorporated church organization and institutions into a form of civil government by which the new settlement was regulated. The Mormon community was hierarchical, tightly controlled, and economically efficient. *See generally* C. PETERSON, UTAH: A BICENTENNIAL HISTORY (1977).

Prior to statehood, Utah was widely perceived as a theocracy. Statehood was granted in 1896 only after federal efforts to break up the Mormon Church and to end the practice of polygamy. Efforts to obtain statehood extended over more than 40 years, beginning in the early

1850's but foundering first on the issue of slavery and then later on the twin issues of polygamy and the theocratic institutions of the territory. *See generally* E. LYMAN, POLITICAL DELIVERANCE: THE MORMON QUEST FOR UTAH STATEHOOD (1986); *Flynn, Federalism and Viable State Government — The History of Utah's Constitution*, 1966 UTAH L. REV. 311. In the Edmunds Act of 1882 Congress outlawed polygamy in the territory and created the Utah Commission, a five member board which replaced local authority and provided a federal presence in the territory. The Edmunds-Tucker Act of 1887, among a number of other highly stringent provisions including appropriations for bounty hunters to pursue polygamists, dissolved the corporation of the Church of Jesus Christ of Latter-Day Saints and confiscated its property and assets to the United States. In the early 1890's the Mormon Church Presidency banned the practice of polygamy and dissolved the official church political party known as the People's Party. Pursuant to these measures of good faith on the part of the church, Congress then repealed the confiscatory provisions of the Edmunds-Tucker Act and granted statehood in 1896 for the State of Utah.

The Mormons who populated the Territory during the 1850's immediately established schools in each settlement of the territory. In almost all instances, a single building served as school, chapel, and seat of local government. Education was a central part of the church mission because secular learning was seen as part of universal truth, which emanated from a divine source. According to the Mormon philosophy, the sciences had as their content the discovered truths of God, and the humanities contained the revealed truths of God. All of Mormon education, then, served a religious objective. As Brigham Young instructed one school official, "Whatever you

teach, even the multiplication tables, do it with the spirit of the Lord." BENNION, at 125. "Like the Israelites of old, the leaders and prophets of this new theocracy recognized from the beginning that the realization of their goals must be attained through the establishment, not only of a unique ecclesiastical, but a unique economic and educational system." *Id.* at iii (Foreword by F. Swift).

As statehood approached, it became apparent that a separation was needed between the public schools and the church. The non-Mormon minority, which had significant power through ties with the federal government, vigorously pressed for the establishment of a free public school system devoid of sectarian influence, while at the same time schools of other denominations were providing effective education more cheaply than the financially strapped Mormon schools could. BENNION, at 145. The Edmunds-Tucker Act had taken administrative control of the Mormon schools from the church and placed it in the hands of a federal commissioner who was specifically directed to eliminate the use of Mormon scripture as texts in the schools. Not only were Mormon children being deprived of studying the faith of their fathers in the public schools, but many of them were being taught in and influenced by other denominational schools and their doctrines. *Id.* at 136. These feelings led to the establishment of the Mormon "academies," which were secondary schools not under the mandate of the Edmunds-Tucker Act but designed for education of Mormon youth. *Id.* at 147.

The Free School Law of 1890 established a system of free public schools in the Territory. The law called for compulsory attendance and a nonsectarian Board of Education. Because church members could not afford both to pay taxes for support of the public schools and to

pay tuition at the Mormon schools, the church leadership eventually came to support the public schools while attempting to educate teachers for those schools in Mormon colleges. *Id.* at 135.

In 1920, the church abandoned its own system of schools in favor of two related devices. One was the creation of a "Seminary" for religious instruction of public school students and the other was the creation of "normal" schools for the training of teachers for the public schools.

The objective of the Seminary system was to locate a Mormon facility adjacent to a public high school for the offering of religious instruction during school hours to students who would be released from the public school for that purpose. In this way, "L.D.S. students could and would receive the same benefits of religious education as in church schools with about one-eighth the educational investment or expenditure." J. CLARK, CHURCH AND STATE RELATIONSHIPS IN EDUCATION IN UTAH 307 (Utah State Univ. dissertation 1958). The seminary system continues today in much the fashion originally intended. There are over 100 seminaries in operation. For those public schools at which there is not a seminary located in proximity, religious instruction is typically carried out at the local ward house of the church after school hours.

The seminary system was analyzed in the 1950's after this Court's rulings in *McCollum* and *Zorach*. Guidelines were drawn up by the Utah State Board of Education in an effort to ensure that the released-time components of the system complied with this Court's rulings. The constitutionality of the system was not litigated, however, until 1978.

Lanner v. Wimmer, 463 F.Supp. 867 (D. Utah 1978), *aff'd & rev'd in part*, 662 F.2d 1349 (10th Cir.

1981), resulted in striking down some aspects of the interconnected operations of the public schools and the Seminaries. The plaintiffs attempted to show that the Seminaries affiliated with the Logan Junior and Senior high schools were so closely interconnected with the public schools that their operation was in violation of the establishment clause. Among the factors relied upon were the granting of academic credit for coursework in the seminaries, use of seminary attendance in counting student attendance for state funding purposes, reporting of grades from the seminary to the public school, interconnected bells and public address systems, taking of attendance and registration for seminary by public school employees or student workers, architectural integration of the seminary and public school buildings, and social interactions of the two school systems. The district court held that only some of the academic credit violated the establishment clause. Two "Bible study classes are religious and sectarian in nature. They are not planned and taught from a strictly historical, literary or comparative view-point, but are geared toward reinforcing LDS beliefs."

On appeal, the Tenth Circuit affirmed the injunction against granting credit for these courses but for essentially the opposite reason as given by the district court. The court of appeals looked at the State Board policy that allowed credit only for coursework that was "not mainly denominational" and found that monitoring the coursework by public school officials would constitute impermissible entanglement.

The 1920 decision to establish the Seminary system coincided with a decision to open Mormon "normal" schools for the training of teachers who would then be available for teaching in the public schools. Through this device, the church officials hoped to influence the educa-

tion of all children in the state without assuming control of the public schools. Interestingly, this decision was made with the encouragement of the State Superintendent of Instruction. BENNION at 186-188. Most of those schools have been turned over to the state, and today the church's higher education facilities consist only of Brigham Young University in Utah and Hawaii and Ricks College in Idaho. It might be difficult to document to what extent the influence of the Mormon training of teachers is still felt, but there is little question that it exists at least in some communities. A number of studies have been made of various facets of this question. *See* CLARK, *supra;* D. FOXLEY, MORMON MYTH OR MONOPOLY: A CONTEMPORARY STUDY TO DETERMINE THE PERCEIVED INFLUENCE OF THE MORMON CHURCH ON UTAH POLITICS (Utah St. Univ. thesis 1973); R. POORE, CHURCH-SCHOOL ENTANGLEMENT IN UTAH: *Lanner v. Wimmer* (Univ. of Utah dissertation 1983). The word that best sums up the impact of Mormon culture on the public schools is "influence," typified by "local elites" who determine policy and practice in their own communities. W. REES, THE PROFESSIONAL EDUCATION ASSOCIATION MOVEMENT IN UTAH: AN INTERPRETIVE HISTORY (Univ. of Utah dissertation 1977).

One author has described Utah society in religious terms:

> Utah society forms groups along such conventional lines as political persuasion, profession, education, place of origin, age group, ethnic background and level of income. Nevertheless, the Mormon/non-Mormon division cuts through and influences all other grouping arrangements. . . . In the place of disruptive political thought, tension now vents itself in group loyalties, in a thousand private adjustments, and by the more or less constant awareness that this particular social division, like death and taxes, is a significant fact of life in Utah.

PETERSON, UTAH - A BICENTENNIAL HISTORY (1977).

A political science professor viewed the question in this fashion:

> Whenever one church claims the membership of 72% of the people of the state, as the Mormon Church does in Utah, its doctrines and practices are certain to have a pervasive influence on the folkways of the state. In so doing, even if it never took a stand on a political question, the Mormon Church would still significantly influence the metes and bounds of the political struggle in Utah.

Williams, *The Separation of Church and State in Mormon Theory and Practice*, 1 DIALOGUE 30 (1966).

The degree of this dominance might be expected to change as the level of dominance of one religion in the population changes. At the county level, Mormon adherence ranges today from around 50% in the Salt Lake vicinity to well over 90% in rural counties of the state.

The Utah State Board of Education has made a firm decision to place control of the schools in the hands of local school districts. (Brief for the States of Utah, *et al.*, in Support of Petition for Certiorari, at p.2) The combination of the State Board's basic policy of local control and the dominance of Mormon leadership in local communities could produce a dominance of Mormon culture and thought in the public schools. The Seminary system is one example of how the day-to-day life of the high schools is affected by the Mormon presence.

In the *Lanner* litigation, there was testimony about the degree to which the everyday social life of the Logan high school was governed by whether a student was Mor-

mon or was attending the Mormon seminary. That testimony even included description of physical confrontations over the issue. Even more telling, perhaps, would be the more subtle experiences of those students who felt the group pressure to conform to the dominant religion or abandon various aspects of adolescent social life. As another example, in response to assertions of discrimination in one school district, the State Board of Education conducted a survey in which 75% of the nonMormon respondents reported that they suffered religious discrimination "sometimes" or "often." *KUTV v. State Bd. of Education*, 689 P.2d 1357, 1359 (Utah 1984).

B. Any Result That Depends on the Content or Context of Prayers Would Be Unworkable

The combination of *Lynch* and *Allegheny* make the validity of some public religious observances depend on the context in which they are conducted. In the case of graduation prayer, a contextual test could focus either on the degree of pervasiveness of one religion within a particular school or on the degree to which school officials controlled the content of the prayers. Either would be unfortunate. Especially destructive would be litigation over the extent to which a particular religion dominates a particular school.

1. *It is impossible to have nondenominational prayers without official monitoring and dictation of content.*

One way of approaching the issue of context would be to focus on the degree to which particular prayers promoted a certain denomination or religious group. The district court in Utah ordered that graduation prayers "must be nonsectarian, nondenominational, and nonproselytizing." The court also stated, however, that there

could be "clear guidelines as to acceptable content, no preliminary review by school officials of the prayers, and no monitoring." The first objective of the court's order is impossible in light of the second objective.

To illustrate, it is only necessary to glance briefly at the sample prayers from prior graduation ceremonies attached as an Appendix to this brief. Each opens with "Our Father in Heaven" or "Our Dear Heavenly Father." Each closes with "We say this [or these things] in the name of [the Son] Jesus Christ. Amen." In the body of the prayer, each first thanks the deity for certain things or events and then makes certain requests.

The standardized format of these prayers is hardly accidental. They are instantly recognizable as adhering to the tenets of a particular denomination. To avoid this, school officials could prohibit address to an anthropomorphic deity, in which case these prayers could not be offered or would at best become meaningless. Another approach would be to prescribe a standard form of prayer different from the standard form displayed here. That would be tantamount to government-imposed religion of the precise nature struck down in *Engel*.

There is no conceivable way to achieve the twin results of nonsectarian or nondenominational prayer and a lack of official monitoring of the content of prayers. This is a classic illustration of the conundrum outlined in the effects and entanglements branches of the *Lemon* test. It is because government cannot engage in recognition of religious practices without either endorsing a particular denomination or dictating the content of prayer that prayers at high school graduation offend the establishment clause.

2. *Litigation over the context of graduation prayer would be extraordinarily divisive in Utah*

A second way of approaching the context of graduation prayers would be to ask to what extent a particular school is dominated by a particular religion. We will attempt to describe what litigation would look like if this Court were to promulgate a rule making the validity of a particular graduation prayer depend upon the school context in which the prayer were offered.

Some evidence might consist of public records, such as the minutes of school board meetings or memoranda of the school officials. But this would not be the heart of the problem. A litigator would be faced with a difficult ethical choice between failing to litigate the issue completely and zealously or asking students and parents essentially to become spies on their classmates and teachers. For example, one might accumulate data about the number of instances in which certain doctrinal or cultural references were made in class. Every religion carries its own set of code words and liturgical references that would be understood to have religious connections. References by teachers or classmates to these well-understood "insider trademarks" could be recorded. Another salient point of evidence would be the structure of students' social lives. To the extent that students structured their social activities around church activities, this would tend to show the degree of pervasiveness of the dominant religious culture. Students might be called to testify about the number of social activities arranged through the Seminary, about the number of times that a date was refused because the asker was not of the proper faith, about the number of times that religious references were made in social contexts. In other words, students might be asked to testify about intimate experiences, fears and concerns for purposes of litigation.

These are daunting prospects for at least two reasons. First, they present the possibility of further polarizing and dividing communities that are already separated around the issue of religion. The ACLU of Utah takes separation of church and state as a goal largely because it wishes to keep religion from being a divisive influence in the lives of all citizens. To create divisiveness while trying to eliminate a divisive influence in the schools would be a very difficult moral choice.

The second reason for hoping to avoid this type of litigation is the effect that it would have on the students themselves. The most significant impact of graduation prayer is on the students still in the school rather than on the graduating senior. The nonMormon student is already under intense pressure from peer group isolation. Conversely, the Mormon student may feel guilt or pressure from public religious displays. To ask either student to become a complainant or witness in litigation and relate intimate incidents from his or her life in a public trial could be debilitating to the normal adolescent.

Of course, we can only speculate how the litigation strategy would unfold under different rulings by this Court. What is important to us is that the Court not require litigation of the issue of the extent to which one religion has a dominant influence within the public schools generally and particularly not litigation of that issue within any one school. Any ruling that leaves the validity of graduation prayer subject to the context in which it is offered creates that danger. It is true that any such litigation would be an attack not on the Mormon Church or its adherents but on the public school system's inculcation

of any church's particular tenets or culture. But it could not be presented so that others would understand it that way. It would inevitably be seen as an attack on Mormons, or at least an attack on religion generally. At best, it would heighten tensions and sharpen divisions along the lines of religious groups, a phenomenon that the establishment clause itself is designed to prevent.

Therefore, we urge the Court to adopt a bright-line rule that graduation prayer is either valid or invalid. As indicated, we believe that rule should be that graduation prayer is invalid because of its inherent propensity to endorse religion and thus to tend toward an establishment of religion.

CONCLUSION

For the above reasons, we respectfully urge the Court to adopt a rule that makes prayer at graduation ceremonies unconstitutional regardless of the context in which that prayer is presented.

Respectfully submitted

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APPENDIX

OREM HIGH SCHOOL GRADUATION

June 1, 1990

Invocation

Our Father in Heaven,

We come to you today from all walks of life
and varied situations and religions,

And we just want to express our thanks and gratitude
today for the opportunities we have had
to get a good education.

We are thankful for the teachers, for the administrators,
for our parents and our family and our friends
who encouraged us and helped us make us
where we are today.

We are thankful for the many freedoms we enjoy
by living in a free country.

And bless us Father, as we go out that we may defend these
rights, and help us that we may rise to our full
potential, and live lives that may be beneficial
to ourselves and others.

We say these things in the name of Jesus Christ

Amen.

A-2

OREM HIGH SCHOOL GRADUATION

June 1, 1990

Benediction

Our Father in Heaven,

Once again we come before thee to offer our thanks.

We are so grateful for those who have helped us
in our high school career.

We thank Thee for our friends that have offered us
encouragement in the hallways and the classes.

We are thankful for our parents who have given us
the help we need at home.

We are thankful very much for our fine faculty,
for all the hours they spent preparing lessons
for us, grading papers, and giving us outside
encouragement.

We are thankful for the facilities we were able to
use this day,

And we ask that as we leave after our graduation,
we might be able to use the knowledge
that we have gained from all of our educational
career in a manner that would help those around us.

We ask that we can always remember to lift
the spirits of our neighbors.

We say these things in the name of the Son, Jesus Christ

Amen.

A-3

GRANITE HIGH SCHOOL
COMMENCEMENT EXERCISES

June 1, 1990

Our dear Heavenly Father,

We are gathered here on this beautiful evening to honor the graduating class of 1989,

We ask that everyone can be on their best behavior this fine evening and we'd like to thank all the many people who brought us here today,

We'd like to thank all the many people who brought us here today, our teachers, our family and friends.

When the time comes, I hope we can go home.

We say this in the name of Jesus Christ. Amen.